RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-254

In the Supreme Court of the United States

WATER SPLASH, INC.,

Petitioner,

v.

TARA MENON,

Respondent.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals, Houston, Texas

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUMMARY

Respondent agrees the question presented implicates a split of authority on an important federal question. However, respondent claims review is unwarranted because her position on the question presented is correct and, even if it were not, the judgment below could be affirmed on an alternative basis. Neither argument counsels against review.

Because respondent's position represents the minority viewpoint, the question presented warrants review even if respondent's position were correct. And respondent's alternative ground for affirmance was not addressed—or even acknowledged—by the lower courts. In addition, it does not counsel against review for two further reasons. First, the argument that service was invalid in the trial court because it did not comply with foreign law is unsupported by applicable authority. Second, respondent conceded in the court of appeals that the federal question presented here was determinative of whether service of process was proper in this case.

ARGUMENT

As a threshold matter, it is important to note what respondent does not deny. Respondent does not deny that the question presented implicates an important and recurring federal question on a fundamental issue of civil procedure that has split state and federal courts for over 25 years. Respondent also does not

deny that the court of appeals followed the minority position. Finally, respondent does not deny petitioner's contention that the one potential strike against review (that the decision below arises from a state intermediate court) is of lesser weight given other considerations.

Respondent does argue against review on the basis that her position on the merits is correct. As to that, petitioner's views are not restated here as they have already been presented by the petition, the dissent below, and other lower courts that have also adopted it. In addition, respondent's position on the merits does not counsel against review: if anything, because respondent's position represents the minority viewpoint on a longstanding split of authority, the question presented would, if anything, be more worthy of review if respondent's position were ultimately determined to be correct.

Respondent otherwise claims that the judgment below could be affirmed on an alternative basis. In particular, respondent contends that, even if service by mail were permitted by the Hague Service Convention ("Convention"), such service was nevertheless ineffective here because (1) the Convention has not been implemented in Quebec; (2) the validity under federal law of service by mail to Quebec depends on its validity under Quebec domestic law; and (3) service by mail is invalid under Quebec domestic law. Setting aside point (3)—which neither lower court addressed or even mentioned—points (1) and (2) are both incorrect. Independently, respondent waived all three arguments concerning Quebec law by conceding in the

court of appeals that the single federal question presented here was outcome determinative of the case.

I. Because the Convention is self-executing, it is irrelevant whether it was implemented in Quebec.

Respondent argues that the validity of a treaty within a foreign State or subdivision depends on whether the treaty was implemented by the domestic law of that foreign State or subdivision. But that principle only applies when a treaty is not self-executing. See *Medellin* v. *Texas*, 552 U.S. 491, 504-05 (2008). Respondent cites no authority that the Hague Service Convention is *not* self-executing, however, and numerous courts have found it is, including the Fourth Circuit. See *Vorhees* v. *Fischer & Krecke*, 697 F.2d 574, 575 (4th Cir. 1983); see also *Trask* v. *Serv. Merch. Co., Inc.*, 135 F.R.D. 17, 21 (D. Mass. 1991); *Rissew* v. *Yamaha Motor Co.*, 129 A.D.2d 94, 98 (N.Y. App. Div. 1987), and authorities cited therein.

II. Even if the Convention were not self-executing, the substance of Quebec law is irrelevant to the federal question presented.

Respondent cites Supreme Court authority for the proposition that treaties which are not self-executing must be implemented within a forum before they can be invoked in that forum. Opp. at 7. But as also shown by those cases, the relevant forum for that principle is *the forum where the treaty is invoked.* Here, however, that forum is Texas[1]—not Quebec—and so respondent's argument about the substance of Quebec law is

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[1] Respondent does not contend that the Convention is inoperative in Texas, and the conclusion that it is operative

simply misplaced. Consistently, although respondent's opposition cites 29 state and federal cases that postdate the Convention, none invalidated foreign service on the basis that, although service was valid under the Convention,[2] it was invalid under the domestic law of any foreign State or subdivision.

Comity Considerations.—Although respondent does not use the word "comity," this Court might independently question whether that doctrine could come within the scope of the question presented if service were invalid under Quebec domestic law as respondent claims. As a threshold matter, because the federal issue here arises from state law incorporation of United States treaty obligations, see *supra* note 1, any comity considerations here should only arise under principles of state—rather than federal—common law, and respondent waived any comity argument under state common law by not raising that doctrine in

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there follows from both the fact that the Convention is self-executing and the fact that the Convention has been implemented by reference in the Texas Rules of Civil Procedure. See TEX. R. CIV. P. 108a(d) ("Service of process may be effected upon a party in a foreign country if service of the citation and petition is made . . . pursuant to the terms and provisions of any applicable treaty or convention[.]").

[2] In one case, a court quashed service because service by mail allegedly did not comply with Quebec law. See *Riendeau* v. *St. Lawrence & Atl. R. Co.*, 167 F.R.D. 26, 29 (D. Vt. 1996). But that court never held that service by mail was proper under the Convention and, in fact, was precluded from so holding since the Second Circuit decided in 1986 that the Convention did not authorize such service. See *Ackerman* v. *Levine*, 788 F.2d 830, 839 (2d Cir. 1986).

either the trial court or court of appeals.[3]

That said, if the Court determined that federal comity principles were both relevant and fairly included in the question presented, petitioner would note that other federal courts have held comity to be inapplicable when a treaty controls.[4] See *Kreimerman* v. *Casa Veerkamp*, S.A. de C.V., 22 F.3d 634, 643–44 (5th Cir. 1994) (holding that the Convention's service methods were a "safe harbor" from attempts to quash service on comity grounds); *In re S. African Apartheid Litig.*, 643 F. Supp. 2d 423, 438 (S.D.N.Y. 2009) (refusing to apply comity to prevent plaintiff from serving German defendants via the Convention: "If German courts had reached a final judgment that service via Hague Convention processes would violate German sovereignty or security, comity considerations would be stronger. That has not yet—and may never—come to pass."); see also Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention*,

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[3] In addition, petitioner is unaware of any Texas authority suggesting it would be an abuse of discretion for a trial court to refuse to quash service on state law comity grounds where service was valid under a treaty.

[4] Petitioner did locate one case where a court quashed service by mail, in part, on comity grounds. See *Moberg* v. *33T LLC*, 666 F. Supp. 2d 415, 425 (D. Del. 2009). That court's comity rationale was unsupported by any cited authority, however. In addition, the court's invocation of comity—a doctrine concerning domestic recognition of foreign law—cannot be reconciled with its prior determination that service by mail was permissible under both the Convention and applicable foreign law. *Id.* at 424-25.

86 TEMP. L. REV. 331, 358-361 (2014) (arguing that comity is an inadequate basis for applying foreign law to service of process issues).[5]

III. Respondent waived any arguments regarding Quebec law by concession on appeal.

As previously stated (Pet. 16), respondent conceded on appeal that the validity of service in this case depended solely on the answer to the federal question presented. See *Menon* v. *Water Splash, Inc.*, 472 S.W.3d 28, 35 (Tex. App.—Houston [14th Dist.] 2015) (Christopher, J., dissenting) ("[Menon] concedes that '[i]f Article 10(a) [of the Convention] authorizes service of process by a litigant mailing or e-mailing documents directly to a party, without going through the Central Authority of the receiving nation, then the service in this case was good.[']" (quoting Appellant's Brief at 20)).[6]

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[5] Courts have quashed service on comity grounds when service was attempted by means *not* authorized by the Convention or when the foreign State objected to the form of service. See *Midmark Corp. v. Janak Healthcare Private Ltd.*, No. 3:14-CV-088, 2014 WL 1764704, at *3 (S.D. Ohio May 1, 2014) (invoking comity to deny plaintiff's request to effectuate service by email); *Lyman Steel Corp.* v. *Ferrostaal Metals Corp.*, 747 F. Supp. 389, 400-01 (N.D. Ohio 1990) (invoking comity to quash service by mail where foreign State objected to such service).

[6] In preparing this reply, the undersigned noticed that the quoted language from the dissent was inexplicably omitted from that opinion's reproduction in the appendix. To avoid any ambiguity on this point, petitioner has thus directly cited the reported decision below.

Respondent does not deny the accuracy of the dissent's quotation of her appellate brief, nor does respondent make any attempt to explain why the dissent's characterization of that quote as a concession was incorrect. Rather, respondent just claims that petitioner's report of the concession, Pet. at 16, was "not accurate." Opp. 9. Respondent does not explain what was inaccurate, however, and just claims she raised the issue in the lower courts.

But petitioner does not deny that respondent argued the validity of service under Quebec law in the lower courts. At the same time, however, respondent cannot deny that she conceded the irrelevance of that issue if service by mail was proper under the Convention, the single federal question presented here. As such, respondent's arguments concerning Quebec law present no alternative basis for this Court, or the lower one, to affirm the judgment.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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